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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

TINCY ANTHONY, Administratrix of the
Succession of James Louis Bankston, Sr.,
real party in interest James Louis Bankston, Sr.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For Writ Of Certiorari
To The Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

James Louis Bankston, Sr. died owning receivable rights to certain monthly and annual payments as a result of a structured settlement for his personal injuries. Payments were through annuity contracts owned by third parties. Mr. Bankston was prohibited from transferring his rights and, therefore, they lacked marketability. This litigation addresses the proper valuation of Mr. Bankston rights for federal estate tax purposes.

Whether Mr. Bankston's receivable rights are valued for federal estate tax purposes by the Section 7520 actuarial tables or by using the fair market value method under Section 2031.

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OPINIONS BELOW

The opinion of the Fifth Circuit of the United States Court of Appeals appears at Appendix A to the petition and is reported at Anthony v. U.S., 520 F.3d 374, (5th Cir. 2008).

The opinion of the United States District Court for the Middle District of Louisiana appears at Appendix B to the petition and is unpublished.

STATEMENT OF JURISDICTION

Tincy Anthony, the administratrix of the Succession of James Louis Bankston, Sr. (the "Petitioner"), seeks a writ of certiorari to a final judgment from the United States Court of Appeals for the Fifth Circuit, entered on March 4, 2008. The Supreme Court has jurisdiction under 28 U.S.C. 1254.

CITATION OF STATUTES AND REGULATIONS

26 U.S.C. § 7520(a)
26 C.F.R. § 20.2031-1(b)
26 C.F.R. § 20.7520-3(b)(1)(ii) & (iii)

STATEMENT OF THE CASE

James Louis Bankston, Sr. died owning receivable rights to certain monthly and annual payments as a result of a structured settlement for his personal injuries. This litigation addresses the

proper valuation of Mr. Bankston rights for federal estate tax purposes.

By letter dated September 13, 2001 Petitioner filed a claim for refund of federal estate taxes with the Internal Revenue Service in the amount of $427,624. Petitioner stated that, "[a]n adjustment in the amount of $1,176,810 on Schedule I is made to decrease the valuation of annuities from $2,375,710 to $1,198,900 in order to reflect fair market value at the date of death."

By letter dated April 24, 2002 the Internal Revenue Service disallowed Petitioner's refund claim stating, "[t]he Service does not recognize any discounts from the values prescribed by the Section 7520 tables based upon alleged lack of marketability."

Petitioner filed suit on March 25, 2002 in the United States District Court for the Middle District of Louisiana. On August 31, 2004 the United States, and on September 1, 2004 Petitioner, filed cross motions for partial summary judgment on what was the proper valuation method to use. The United States required valuation of Mr. Bankston's receivable rights using the tables under Section 7520, and Petitioner urged valuation of those rights at fair market value under Section 2031. On June 17, 2005 the District Court granted the United States' motion and denied Petitioner's motion.[1]

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1 Petitioner first filed a notice of appeal on June 22, 2005, but the same was premature and by joint stipulation was

On January 3, 2007 the District Court entered a final judgment, and Petitioner filed her notice of appeal on January 10, 2007. On March 4, 2008 the Fifth Circuit entered a final judgment affirming the District Court's judgment.

REASONS FOR GRANTING THE WRIT

The Court should grant this writ because the Fifth Circuit has entered a decision in conflict with the decisions of both the Second Circuit and the Ninth Circuit of the United States Court of Appeal on the same important matter. Rule 10(a).

The federal estate tax is imposed on a decedent's "taxable estate" which is derived from the decedent's "gross estate".[2] Generally the fair market value method of valuation under Section 2031 is determinative of the value of the assets included within the gross estate,[3] but actuarial tables are

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dismissed without prejudice on October 18, 2005.

2 IRC Sections 2001, 2031, 2033-2045 and 2051.

3 Fair market value is "the price the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts." Treas. Reg. § 20.2031-1(b). "The buyer and seller are hypothetical, not actual persons, and each is a rational economic actor, that is, each seeks to maximize his advantage in the context of the market that exists at the date of valuation." Estate of Jameson v. Comm'r, 267 F.3d 366, 370 (5th Cir. 2001).

provided in accordance with Section 7520 as a special rule for valuing annuities, except as specified by Treasury Regulations promulgated under the authority of subsection (b) of Section 7520.[4]

The Fifth Circuit's decision in this case along with its prior decision in Cook v. Commissioner of Internal Revenue, 349 F.3d 850 (5th Cir. 2003), conflict with the Ninth Circuit's decision in Shackleford v. United States, 262 F.3d 1028 (9th Cir. 2001), and with the Second Circuit's decision in Estate of Gribauskas v. Commissioner of Internal Revenue, 342 F.3d 85 (2nd Cir. 2003).

This and the other three cases have decided the same issue of law — whether restrictions on the transfer of receivable rights payable to a beneficiary through an annuity owned by a third party require valuation by the Section 2031 fair market value method rather than under the Section 7520 tables. The Ninth Circuit in Shackleford and the Second Circuit in Gribauskas, departed from the Section 7520 tables and used the Section 2031 fair market value method, but the Fifth Circuit here and in Cook remained with the Section 7520 tables.[5]

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4 Section 7520(b) States that Section 7520 "shall not apply for purposes of part I of subchapter D of chapter 1 or any other provision specified in regulations."

5 Shackleford, Gribauskas and Cook all concerned the valuation of a decedent's lottery winnings prohibited from transfer by state law; here the prohibition on transfer is by contract.

The Ninth Circuit in Shackleford, upon observing that the statutory restrictions on transfer reduced the marketability and, thereby, the fair market value of the right to receive future lottery payments, agreed with the District Court that using the Section 7520 tables produced a substantially unrealistic and unreasonable result which did not accurately reflect economic reality. Similarly, the Second Circuit in Gribauskas found that the application of the Section 7520 tables produced a substantially unrealistic and unreasonable result. Accordingly, Shackleford and Gribauskas required departure from the Section 7520 tables and the use of the Section 2031 fair market value method of valuation.

In this case and in Cook, the Fifth Circuit disagreed with Shackleford and Gribauskas and concluded that the Section 7520 value of receivable rights restricted from transfer was not so unreasonable and unrealistic as to warrant resort to a different valuation method.

The Fifth Circuit in this case considered 26 C.F.R. § 20.7520-3(b)(1)(ii) which applies to estates of those dying after 1995 and concluded that it did not change the law.

CONCLUSION

Due to the conflict among the federal circuits of the Court of Appeals and the importance of the issue presented for review, the petition for writ of

certiorari should be granted. Otherwise, the valuation of receivable rights for federal estate tax purposes and, most likely, other tax purposes, which rights arise from structured settlements, lottery winnings and similar sources, will be inconsistent, varying depending on geography and which circuit of the Court Of Appeals has jurisdiction, rather than being consistent and uniform based on an applicable nationwide law. The varying valuation methods will violate the equal protection clause of the United States Constitution.

Respectfully submitted:

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Date: May 27, 2008

United States Court of Appeals
For The Fifth Circuit

No. 07-30089

Tincy ANTHONY, Administratrix of the Succession of James Louis Bankston, Sr., on behalf of James Louis Bankston, Sr.

Plaintiff-Appellant

v.

UNITED STATES of America

Defendant-Appellee

Appeal from the United States District Court
for the Middle District of Louisiana.

Before BARKSDALE, DENNIS and SOUTHWICK, Circuit Judges.
SOUTHWICK, Circuit Judge:

A decedent's administratrix seeks our reversal of the district court's conclusion that a non-transferable private annuity must be valued, for estate tax purposes, in accordance with certain tables set out in the Internal Revenue Code. Because we conclude that this case presents no applicable exception to valuation of the relevant annuities by use of the tables, we affirm.

I. FACTS AND PROCEEDINGS

James Louis Bankston, Sr., sustained serious injuries in an automobile accident in 1990. He filed suit seeking damages from various defendants. In May 1991, Bankston agreed to a structured settlement of his claims and thereby became the beneficiary of three annuities. The annuities were owned by three separate insurance companies. Each annuity guaranteed monthly or annual payments for a period of at least fifteen years.[1] The payments due under two of the annuities could not be "anticipated, sold, assigned or encumbered." The third annuity provided that payments were "non-assignable." The prohibitions on assignment form the foundation for the arguments made by the taxpayer.

Bankston died on July 30, 1996. At the time of his death, Bankston was scheduled to receive ten additional annual payments from one annuity and monthly payments until July 2006 from the other two. Bankston's estate ("the Estate") initially

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[1]The Transamerica annuity (owned by Transamerica Occidental Life Insurance Company) guaranteed Bankston fifteen annual lump sum payments, ranging from $25,000 in 1992 to $150,000 in 2006. The MetLife annuity (owned by MetLife Security Insurance Company) guaranteed Bankston monthly payments for fifteen years and life thereafter, beginning with $9,350 in July 1991 and increasing three percent annually. The Jamestown annuity (owned by Jamestown Life Insurance Company) guaranteed Bankston monthly payments for fifteen years and life thereafter, beginning with $7,000 in July 1991 and increasing 3 percent annually.

estimated the present value of Bankston's right to the guaranteed payments to be $2,371,409, using the tables prescribed by 26 U.S.C. § 7520 and the accompanying regulations (the "annuity tables" or "Section 7520 tables"). In April 1997, the Estate reported a tax liability on the annuities in the amount of $468,078. An audit by the Internal Revenue Service resulted in an additional tax of $142,605. The Estate paid its total tax liability ($610,683) plus interest in monthly installments between May 1997 and March 2001.

In September 2001, the Estate claimed that it had overvalued the annuities in its initial filing and was due a refund of estate taxes in the amount of $427,620 plus interest.[2] According to the Estate, the annuities should have been assigned their "fair market value" without regard to the annuity tables because the non-transferability clauses rendered the annuities subject to a restriction under 26 C.F.R. § 20.7520-3(b)(1)(ii). The IRS denied the claim. The Estate filed suit against the United States in March 2002. Both parties moved for partial summary judgment on the issue of the proper method of valuation for the annuities. The district court ruled in favor of the government, finding that the prohibitions on assignment of the annuities did not justify a departure from the tables. The district court

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[2]The Estate estimated that the fair market value of the annuities at the time of Bankston's death was $1,198,900, not the $2,371,409 figure provided under the annuity tables.

also found that the result produced by the annuity tables was not unreasonable or unrealistic. Therefore, the district court found that the annuities were properly valued under the tables and no tax refund was due. The Estate appealed.

II. DISCUSSION

While the mathematical computation of fair market value is an issue of fact, determination of the proper valuation method under the Internal Revenue Code is a question of law that this Court reviews de novo. Estate of Dunn v. C.I.R., 301 F.3d 339, 348 (5th Cir.2002). We also review the district court's interpretation of a regulation de novo, applying the rules of statutory construction. Lara v. Cinemark USA, Inc., 207 F.3d 783, 786-87 (5th Cir.2000).

A. The "Restricted Beneficial Interest" Exception to the Annuity Tables: Treasury Regulation § 20.7520-3(b)

1. General Estate Tax Principles

The United States imposes a tax on the taxable portions of the estates of all decedents who are citizens or residents. 26 U.S.C. § 2001. A decedent's estate is composed of "all property, real or personal, tangible or intangible." 26 U.S.C. § 2031(a). Private annuities, like those payable to Bankston, fall within this definition of a taxable estate. SeeTreas. Reg. § 20.2039-1(b)(1)(I).

Treasury regulations provide that "the value of every item of property includible in a decedent's gross estate ... is its fair market value at the time of the decedent's death." Treas. Reg. § 20.2031-1(b). Fair market value is defined as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts." Id. The fair market value of an annuity is generally determined by resort to annuity tables prescribed by the IRS. See26 U.S.C. § 7520(a); Treas. Reg. § 20.7520-1. These tables provide a factor composed of an interest rate component and a mortality component that is used to determine the present value of an annuity. Treas. Reg. § 20.7520-1.

This Court has recognized that "[i]n enacting § 7520(a)(1) and requiring valuation by the tables, Congress displayed a preference for convenience and certainty over accuracy in the individual case." Cook v. Comm'r, 349 F.3d 850, 854 (5th Cir.2003). While the tables inevitably lead to departures from true value, whatever that might be, the error costs are perceived as small in the aggregate. Id. The tables provide some measure of certainty and administrative convenience that would be disrupted if every attempt to value an annuity deteriorated into a battle of experts regarding market value.

However, there are limited situations in which the values determined by application of the annuity tables need not be used. When the tables result in a

value that is unrealistic and unreasonable, other valuation methods should be employed. See Cook, 349 F.3d at 855 (citing O'Reilly v. Comm'r, 973 F.2d 1403, 1407 (8th Cir.1992)). This case-law exception to the tables has existed for some time. See Weller v. Comm'r, 38 T.C. 790, 802, 1962 WL 1155 (1962). Effective with estates of decedents who died after December 13, 1995, the Treasury Department promulgated regulations that provide an explicit exception to the tables for "restricted beneficial interests." Treas. Reg. § 20.7520-3(b)(ii) & (c).

The regulations define a "restricted beneficial interest" as "an annuity, income remainder, or reversionary interest that is subject to any contingency, power, or other restriction, whether the restriction is provided for by the terms of the trust, will, or other governing instrument or is caused by other circumstances." Treas. Reg. § 20.7520-3(b)(ii). Generally, a restricted beneficial interest should be assigned its fair market value without regard to the annuity tables. Treas. Reg. § 20.7520-3(b)(ii) & (iii).[3] In Cook, this Court analyzed the case law exception to the tables, not this regulation. We have yet to interpret or apply the regulatory "restricted

[3]The regulations note that a "special" Section 7520 annuity factor may be used to value a restricted beneficial interest in some circumstances. Treas. Reg. § 20.7520-3(b)(ii). Under those circumstances, a party may request a special annuity factor from the IRS. Id. The "special" annuity factor is not an issue in this case.

beneficial interest" exception.

To understand this regulation and its application, we look first at the law applicable to estates that were not subject to the regulation, then seek to determine the change, if any, that the regulation wrought.

2. The Law for Estates with pre-December 14, 1995, Valuations

This Court in 2003 addressed the proper method for valuing an estate's interest in non-transferable lottery payments; the right to the payments was determined to be a private annuity that could be valued under the tables. Cook, 349 F.3d at 855. The death of the Cook decedent occurred prior to the 1995 effective date of the regulation that we will later analyze.

The Cook estate argued that the annuity tables did not account for the lowered present value of the right to these payments caused by marketability restrictions; thus, departure from the tables was necessary to avoid an unreasonable result. Id. at 855-57. The annuity-table valuation of the right to the payments exceeded by almost four million dollars the lowest valuation by an expert, and exceeded the highest by over two and a half million dollars. The court found that the disparity between the value reached under the tables and the valuation by experts was attributable to a reason that was irrelevant to the valuation, namely, the

non-marketability of the right to receive the lottery payments. Id. at 856. Therefore, Cook held that departure from the tables was not necessary because "the non-marketability of a private annuity is an assumption underlying the annuity tables." Id.

> Marketability is important to the valuation of an asset when capital appreciation is an element of value or when the value would otherwise be difficult to ascertain. Other kinds of private annuities are valued under the tables despite being non-marketable . . . . [N]on-marketability does not alter or jeopardize the essential entitlement to a stream of fixed payments.

Id. at 857 (citations and quotation marks omitted). Cook analyzed two other circuits' precedents that recognized a non-marketability exception to the annuity tables, then rejected their rationale and holdings. Id. at 855-57 (citing Estate of Gribauskas v. Comm'r, 342 F.3d 85 (2d Cir.2003); Shackleford v. United States, 262 F.3d 1028 (9th Cir.2001)).

Cook is important here for two reasons.[4] First,

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[4] The Estate suggests that Cook is distinguishable from the present case because the Cook annuitant was also the owner of the annuity. Cook, 349 F.3d at 851-52. In the present case, other entities owned the Bankston annuities. We do not find this to be a significant distinction. The interest to be valued is the right to receive payments from an annuity, regardless of who

the opinion is this Circuit's definitive interpretation of the law governing departure from the annuity tables as it existed prior to December 13, 1995, the effective date of Section 20.7520-3(b). As Cook noted, courts had departed from the valuation tables under the "unrealistic and unreasonable" standard "only when individual cases involved facts substantially at variance with factual assumptions underlying the tables." 349 F.3d at 854-55. Even courts that have recognized a non-marketability exception to the tables agree with Cook's interpretation of prior case law. See e.g., Gribauskas, 342 F.3d at 88 ("The Commissioner is correct in characterizing the case law up to this point-excluding, of course, Shackleford-as authorizing departures only when the actual facts are inconsistent with the assumptions underlying the tables."). Prior to Shackleford and Gribauskas, the "unrealistic and unreasonable" exception was a narrow one. Its application was confined to a limited set of circumstances, such as cases where the actual rate of return was lower than the assumed rate of return in the tables, the death of the measuring life was imminent due to a terminal illness, or the income stream would be exhausted

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owns the annuity. SeeTreas. Reg. § 20.2039-1. Both here and in Cook, the interest rendered non-transferable by agreement (be it a true ownership interest or merely a contractual right to receive payments) would otherwise be transferable. See 29 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 74.10 (4th ed.2000) ("Generally, all contract rights may be assigned in the absence of clear language expressly prohibiting the assignment....").

before expiration of the income term. Cook, 349 F.3d at 855; Gribauskas, 342 F.3d at 88.

Second, Cook presented this Court with an opportunity to recognize a new, non-marketability exception to the annuity tables. Such an extension of the law was rejected. Cook found the Second and Ninth Circuits' rationale unpersuasive in the context of valuing a private annuity:

> We agree that the right to alienate is necessary to value a capital asset; however, we think it unreasonable to apply a non-marketability discount when the asset to be valued is the right, independent of market forces, to receive a certain amount of money annually for a certain term.

Cook, 349 F.3d at 856. The Court refused to depart from the "longstanding trend" of requiring valuation under the tables unless a case involved facts that disproved assumptions underlying those tables. Id.

3. Treasury Regulation § 20.7520-3(b)

In its brief, the Estate concedes that Cook addressed a nearly identical issue of law as presented in this appeal. However, it argues that this appeal is governed by the "restricted beneficial interest" exception to the Section 7520 tables-an exception that was not considered in Cook because it was not in effect as to Cook's estate. The Estate argues that all estates with a valuation date after December 13,

1995, are governed by the language of Section 20.7520-3(b)(1)(ii), which precludes the use of annuity tables in valuing a "restricted beneficial interest," that is "an annuity ... that is subject to any contingency, power, or other restriction...." The Estate would have us read the term "other restriction" broadly, to create an exception to the tables based on the type of marketability restrictions placed on Bankston's annuity interest.

The Estate is correct that Cook did not, indeed, could not properly consider Section 20.7520-3(b). Accordingly, we should re-evaluate the issue discussed in Cook in light of the later regulation. We now turn to that analysis.

a. Regulation's Language and Structure

We interpret regulations in the same manner as statutes, looking first to the regulation's plain language. Lara, 207 F.3d at 787. Where the language is unambiguous, we do not look beyond the plain wording of the regulation to determine meaning. Copeland v. Comm'r, 290 F.3d 326, 332-33 (5th Cir.2002). A "regulation should be interpreted in a manner that effectuates its central purposes." Jochum v. Pico Credit Corp. of Westbank, Inc., 730 F.2d 1041, 1047 (5th Cir.1984). Further, "courts should not interpret an agency regulation to thwart the statutory mandate it was designed to implement." Id.

The language of Section 20.7520-3(b)(1)(ii) is broad: "[a] restricted beneficial interest is an annuity,

income, remainder, or reversionary interest that is subject to any contingency, power, or other restriction, whether the restriction is provided for by the terms of the trust, will, or other governing instrument or is caused by other circumstances." In effect, the Estate asks this Court to begin and end our analysis of Section 20.7520-3(b)(1)(ii) by reading only three words of the regulation-"any ... other restriction." As we will explain, we find more to be required, namely, a consideration of the regulation as a whole and interpreting that phrase in context. Lara, 207 F.3d at 787; see Malacara v. Garber, 353 F.3d 393, 400 (5th Cir.2003).

First, we note that the "other restriction" language follows two specific types of restrictions, a "contingency" and a "power." Both are restrictions that might undermine the fundamental assumptions supporting the valuation of an "ordinary beneficial interest" under the tables. SeeTreas. Reg. § 20.7520-3(b)(1)(i).[5] For example, the right to receive annuity payments may be contingent on the survival of a person who is terminally ill. SeeTreas. Reg. § 20.7520-3(b)(4) (Example 1); Estate of Jennings v. Comm'r, 10 T.C. 323, 1948 WL 147 (1948). Or a

[5] A "contingency" is defined as "[a]n event that may or may not occur; a possibility" or "[t]he condition of being dependent on chance; uncertainty." BLACK'S LAW DICTIONARY 338 (8th ed.2004). A "power" is defined as "[t]he legal right or authorization to act or not act; a person's or organization's ability to alter, by an act of will, the rights, duties, liabilities, or other legal relations either of that person or of another." BLACK'S LAW DICTIONARY 1207 (8th ed.2004).

trustee may exercise a power to invade the corpus and, thereby, exhaust or diminish the income stream. See Treas. Reg. § 20.7520-3(b)(2)(v) (Example 4); Froh v. Comm'r, 100 T.C. 1, 1993 WL 1869 (1993). These restrictions, unlike the one on assignability with which we are concerned in this appeal, threaten to end an annuitant's right to receive any future payments.

Next, the structure of the regulation also suggests a narrow definition of "other restriction." Subparagraph (ii) of Section 20.7520-3(b)(1) defines "restricted beneficial interest." However, subparagraph (iii) does not repeat the term "restricted beneficial interest" but instructs the taxpayer that "[i]f, under the provisions of this paragraph (b), the interest rate and mortality components prescribed under section 7520 are not applicable in determining the value of any annuity ... the actual fair market value of the interest (determined without regard to section 7520) is based on all of the facts and circumstances...." Treas. Reg. §20.7520-3(b)(1)(iii) (emphasis added). Again, emphasis is placed on the two assumptions underlying the tables, not more broadly on any factor that might affect the value. A reading of the entirety of Section 20.7520-3(b) discloses an emphasis on the fundamental assumptions-the interest rate and mortality components-when determining whether departure from the tables is warranted. Subparagraph (2) is replete with illustrations of circumstances under which its exceptions are applicable. The regulation explains that a standard Section 7520 annuity factor should not be used where

an annuity is expected to exhaust the fund before the last possible payment is made (Treas.Reg. § 20.7520-3(b)(2)(i)), where the trust corpus may be invaded without the beneficiary's consent (Treas.Reg.§ 20.7520-3(b)(2)(ii)), or where an individual who is a measuring life is terminally ill (Treas.Reg. § 20.7520-3(b)(3)). In addition, the regulation provides examples of its applications. These are examples in which either the interest rate or mortality component is inapplicable, or the corpus that funds the payments is subject to diversion or exhaustion. SeeTreas. Reg. § 20.7520-3(b)(2)(v), (b)(4). The regulation offers no examples of "marketability" or "transferability" restrictions.

b. Regulation's Promulgation

We also find it useful to examine Treasury Decision 8630 ("T.D. 8630"), which accompanied the final publication of Section 20.7520-3(b). See60 Fed.Reg. 63913 (Dec. 13, 1995). T.D. 8630 summarizes the new regulation as being "necessary in order to provide guidance consistent with court decisions concluding that the valuation tables are not to be used in certain situations." 60 Fed.Reg. at 63913 (emphasis added). In response to comments regarding the application of the tables, T.D. 8630 states that "these regulations generally adopt principles established in case law and published IRS positions." 60 Fed.Reg. at 63914. The only comments to which T.D. 8630 responded concerned exhaustion or underfunding of the trust corpus or a terminally ill measuring life. 60 Fed.Reg. at 63913-14.

Like the regulation itself, T.D. 8630 makes no mention of marketability or transferability restrictions and provides no examples that would invoke such restrictions. The Estate directs our attention to T.D. 8630's declaration that "the tables cannot be used if the instrument of transfer does not provide the beneficiary of the annuity, income interest, or remainder interest with the degree of beneficial enjoyment that is consistent with the traditional character of that property interest under applicable local law." 60 Fed.Reg. at 63913. The Estate argues that the right to market or alienate a private annuity is essential to the beneficial enjoyment of such an interest. Perhaps to show that marketability of such annuities is traditional and not aberrational, counsel for the Estate at oral argument asserted that marketing of structured settlement rights is so common that the value can be easily determined.

It is true that the "beneficial enjoyment" language on which the Estate relies appears in the regulation itself. See Treas. Reg. § 20.7520-3(b)(2)(ii)(A). However, the final regulation elaborates on T.D. 8630's language, stating that "beneficial enjoyment is provided only if it was the transferor's intent, as manifested by the provisions of the governing instrument and the surrounding circumstances, that the trust provide an income interest for the income beneficiary during the specified period of time that is consistent with the value of the trust corpus and with its preservation." Treas. Reg. § 20.7520-3(b)(2)(ii)(A). Consistently with what we have already said about the regulation, this

language emphasizes preservation of the trust corpus. This comports with Cook 's recognition that an annuity, unlike many other assets, grants the beneficiary the "right, independent of market forces, to receive a certain amount of money annually for a certain term." Cook, 349 F.3d at 856 (emphasis added). We find that "beneficial enjoyment," in the context of an annuity, refers to the ability of the corpus to support the periodic payments, not to the ability of the annuitant to transfer his interest in those payments.[6]

4. Summary of regulation

By promulgating Section 20.7520-3(b), the Treasury Department formalized existing case-law exceptions that applied to valuation under the annuity tables-exceptions that were only applicable in cases that presented "facts that disproved assumptions underlying the tables." Cook, 349 F.3d at 856. Cook concluded that the "non-marketability of a private annuity is an assumption underlying the annuity tables." Id. Thus, the marketability restrictions on the Estate's annuities do not disprove a relevant assumption. We do not find the post-December 1995 regulation to be a basis on which to reject the Cook conclusion about non-marketability

[6] The Estate argues it was error for the district court to cite two Technical Advice Memorandums ("TAMs") issued by the IRS; the lower court stated, though, that the TAMs had no precedential value. See26 U.S.C. § 6110(k)(3). We do not rely on these TAMs.

and the tables, which is the law in this Circuit. We continue to hold that the Tax Court was correct when it stated that "the intent of this provision [in Section 20.7520-3(b)] was to formalize the existing case law regarding the validity of the tabular assumptions in situations where facts show a clear risk that the payee will not receive the anticipated return." Estate of Gribauskas v. Comm'r, 116 T.C. 142, 164, 2001 WL 227025 (2001), rev'd, 342 F.3d 85 (2d Cir. 2003).[7] That risk does not arise in the facts before us today.

Requiring valuation of non-marketable annuities under the tables, absent "facts substantially at variance with factual assumptions underlying the tables," respects Congress's "preference for convenience and certainty over accuracy in the individual case." Cook, 349 F.3d at 854-55. As the Tax Court noted:

> the enactment of a statutory mandate in section 7520 reflects a strong policy in favor of standardized actuarial valuation of these interests which would be largely vitiated by the estate's advocated approach. A

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[7]The Second Circuit's reversal of the Tax Court came as the result of that Circuit's expansion of the law under the "unrealistic and unreasonable" standard. Gribauskas, 342 F.3d at 88. The Second Circuit did not interpret Section 20.7520-3(b) and did not criticize the Tax Court's interpretation of that regulation. Id. We find the Tax Court's interpretation of Section 20.7520-3(b) persuasive.

> necessity to probe in each instance the nuances of a payee's contractual rights, when those rights neither alter or jeopardize theessential entitlement to a stream of fixed payments, would unjustifiably weaken the law.

Gribauskas, 116 T.C. at 163-64.

The Estate at oral argument asserted that there exists a market for structured settlement annuities, a market that it alleges is as predictable and more accurate than the Section 7520 tables. Regardless of the precise details, we accept that there is a market-recognized and discounted value to the right to transfer an income stream. There certainly are individuals who will wish to sell at a discounted price their inherited right to receive a guaranteed amount of money that is paid out over a term of years. What Cook held and what we conclude was unchanged by anything relevant since Cook, is that for tax purposes, the annuity tables are not concerned about the difference in market value between an inherited, non-transferable right to receive periodic payments of this sort and an inherited, transferable right to receive such payments. Only if the successor to the decedent desires to assign the annuity is there a practical difference to what that successor has received. Though markets value assignable and non-assignable annuities differently, we continue to conclude that for purposes of Section 7520, the Tax Code does not.

As interpreted in Cook, Section 7520

demonstrates Congress's intent that current tables govern the valuation of annuities unless the factual assumptions underlying those tables are disproved. Those assumptions hold in this case.

In light of its language, structure, and purpose, we do not read Section 20.7520-3(b) so broadly as to require a non-marketability exception from the annuity tables. To the extent the Estate argues that, notwithstanding Cook, the language of Section 20.7520-3(b) is broad enough to permit this Court to adopt a non-marketability exception, we decline to do so. This exception was rejected by Cook. The principles that guided Cook also guide us even with a new regulation as part of the direction given. Instead, we follow the Tax Court's rationale in Gribauskas, endorsed by Cook, that "a restriction within the meaning of the regulation is one which jeopardizes receipt of the payment stream, not one which merely impacts on the ability of the payee to dispose of his or her right thereto." Gribauskas, 116 T.C. at 165.

We affirm the district court's decision that Bankston's annuities were not "restricted beneficial interests" under Section 20.7520-3(b).

B. Unreasonable and Unrealistic Results

The Estate argues that even if the "restricted beneficial interest" exception does not encompass a non-marketability exception to valuation under the tables, valuation under the tables in this case is still inappropriate because the tables yield an

"unreasonable and unrealistic" result. While annuities should generally be valued under the Section 7520 tables, the applicability of the annuity tables is not unassailable. Cook, 349 F.3d at 850. The tables must be used to value annuities "unless it is shown that the result is so unrealistic and unreasonable that either some modification in the prescribed method should be made, or complete

departure from the method should be taken, and a more reasonable and realistic means of determining value is available." Id. at 854. Further, "[t]he party challenging applicability of the tables has the substantial burden of demonstrating that the tables produce an unreasonable result." Id. at 854-55.

The district court held that use of the annuity tables did not create an "unrealistic or unreasonable" result even though the table valuation was substantially less than the Estate's purported free market valuation. Here, the Estate has alleged a $1,176,810 disparity (roughly fifty percent less than the value prescribed by the tables).[8] In Cook, valuation of the non-transferable lottery payments

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[8]The $1,198,900 alternative valuation figure appears to be derived solely from a "fair market value analysis" offered as an exhibit to the Estate's original refund request. This analysis applies a twenty-five percent discount factor when valuing the annuity interest. It is unclear from the record who prepared the analysis or how the preparer arrived at the discount factor. Neither party offered an expert valuation during proceedings before the district court.

under the annuity tables exceeded the highest expert valuation by $2,504,661 (a twenty-nine percent disparity) and the lowest by $3,982,850 (a forty-seven percent disparity). Cook, 349 F.3d at 852 n. 2, 856. Yet, this Court refused to depart from the tables. Id. at 856-57. Adherence to the tables in the face of even greater disparities has occurred. E.g., Estate of Donovan v. United States, 2005 WL 958403, **3-5 (D.Mass. April 26, 2005) (unpublished) (finding sixty-six percent disparity was not unreasonable, citing Cook).

More importantly, the Estate relies solely on marketability restrictions to demonstrate a disparity between the alleged fair market value and the value under the tables. This basis for departure under the "unrealistic and unreasonable" standard for purposes of valuing a private annuity is foreclosed by Cook. 349 F.3d at 856 ("The result produced by the valuation tables is not unreasonable because the factor accounting for the disparity between the expert and the table valuation, i.e., a marketability discount, is not properly applied to the lottery prize."). Cook refused to depart from the annuity tables despite a significant disparity between the result under the tables and the alleged market value. The refusal was because that disparity arose from the same non-marketability factor that explains the disparity before us today. We continue to follow Cook's lead.

The district court correctly determined that the results yielded by the tables were not "unrealistic and unreasonable" in this case.

AFFIRMED.

"unreasonable and unrealistic" result. While annuities should generally be valued under the Section 7520 tables, the applicability of the annuity tables is not unassailable. Cook, 349 F.3d at 850. The tables must be used to value annuities "unless it is shown that the result is so unrealistic and unreasonable that either some modification in the prescribed method should be made, or complete

departure from the method should be taken, and a more reasonable and realistic means of determining value is available." Id. at 854. Further, "[t]he party challenging applicability of the tables has the substantial burden of demonstrating that the tables produce an unreasonable result." Id. at 854-55.

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UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF LOUISIANA

TINCY ANTHONY, ADMINISTRATRIX
OF THE SUCCESSION OF JAMES LOUIS
BANKSTON, SR.

v.

UNITED STATES OF AMERICA

No. Civ.A. 02-304-D-M1.

RULING ON MOTION FOR PARTIAL
SUMMARY JUDGMENT

This matter is before the court on two motions for partial summary judgment. The government filed a motion for partial summary judgment (doc. 22). Tincy Anthony, the administratrix of the Succession of James Louis Bankston, Sr. filed an opposition ("the Estate") (doc. 30). The United States filed a reply brief (doc. 34). The Estate, filed a cross motion for partial summary judgment (doc. 26). The United States filed an opposition (doc. 32). The Estate has filed a reply brief (doc. 33). Oral argument was held on February 10, 2005. Subsequently, both parties filed post-hearing memoranda (docs. 37 and 38). The Estate filed a surreply (doc. 41). The United States then filed a notice of Supplemental Authority (doc. 46). The Estate filed a Rebuttal to the Notice of Supplemental Authority of the United States (doc. 44). United States then filed a surrebuttal (doc. 47). Subject matter jurisdiction is based upon federal question, 28 U.S.C. § 1331. The issue at hand is whether Mr. Bankston's interest in certain annuity

payments at issue should be valued for federal estate tax purposes using the 26 C.F.R. § 20.7520-1 actuarial tables or the fair market value method of 26 C.F.R. § 20.2031-1. The determination of which is the proper valuation method is a question of law to be decided by this Court. [1]Since both motions concern the same issue, they will be addressed together in this ruling.

After careful consideration of the issue, the United States' motion for partial summary judgment (doc. 22) is hereby GRANTED and the petitioner's cross motion for partial summary judgment is hereby DENIED (doc. 26).

I. FACTS

This lawsuit was filed by the administratrix of the Succession of James Louis Bankston, Sr., who avers that at the time of his death, Mr. Bankston was the beneficiary of several scheduled monthly and annual payments of annuity contracts ("the annuities"). These annuities were made in conjunction with a structured settlement to Mr. Bankston for personal injuries he had sustained in an automobile accident on March 13, 1990.

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[1]Estate of Dunn v. Comm'r, 301 F.3d 339, 348 (5th Cir.2002) (citing Estate of Palmer v. Comm'r, 839 F.2d 420, 423 (8th Cir.1988) (citing Powers v. Comm'r, 312 U.S. 259, 260, 61 S.Ct. 509, 85 L.Ed. 817 (1941)(stating that the ultimate determination of fair market value is a finding of fact, while the question of what criteria should be used to determine the value is a question of law subject to de novo review)).

With regard to the annuities, Georgia Pacific made assignments of its obligation to make periodic payments to Mr. Bankston under 130(C) of the Internal Revenue Code to Transamerica Occidental Life Insurance Company ("Transamerica"), MetLife Insurance Company of Louisiana ("MetLife") and First Colony Life Insurance Company ("First Colony") (Collectively known as the "structured payments").[2] Under this arrangement, the structured payments are restricted from being "accelerated, deferred, increased or decreased" and from being "anticipated, sold, assigned or encumbered." Further, the structured payments due are "non assignable and exempt from the claims of creditors to the maximum extent permitted by law."

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[2]The first annuity was to be purchased by Transamerica Annuity Service Corporation from Transamerica Occidental Life Insurance Company, guaranteeing Bankston the right to receive 15 guaranteed lump payments, issued as policy No. 911004. The second was owned by Metropolitan Life Insurance Company, and issued by MetLife Security Insurance Company. Under this annuity, Bankston was to receive monthly payments for 15 years guaranteed and for life thereafter, in an amount beginning with nine thousand three hundred fifty dollars ($9350) on July 1, 1991, and increasing three percent annually thereafter. The third annuity was owned by Jamestown Life Insurance Company and issued by First Colony Life Insurance Company. As the annuitant under this annuity, Bankston was to receive monthly payments, fifteen years guaranteed and for life thereafter, in an amount beginning with seven thousand dollars ($7000) on July 1, 1991, and increasing three percent annually thereafter.

Mr. Bankston died in Baton Rouge, Louisiana, on July 30, 1996. On April 30, 1997, his Estate filed its United States Estate Tax Return ("Form 706") with the Internal Revenue Service ("the Service"). On this original form, under Schedule 1 annuities, the Estate identified Mr. Bankston's total interest in the structured payments using the 26 C.F.R. § 20.7520-1 actuarial tables ("the § 7520 tables"). As of the date of decedent's death, Mr. Bankston's interest was estimated to be $2,371,409. This value was reported on Form 706, filed on April 30, 1997. Based on this figure, the Estate reported its federal tax liability to be $468,078.

Thereafter, on March 1, 1999, the Service audited Form 706 resulting in an estate tax increase in the amount of $142,605. In determining this tax deficiency, the Service accepted the values that the Estate originally reported on its Schedule I with the exception of a slight increase in the value of the MetLife Company annuity.[3]

In total, the Estate paid $698,093 in federal estate taxes and interest in installments between May 5, 1997 and March 19, 2001. Subsequently, by letter dated September 13, 2001, the Estate filed an informal claim for a refund ("the informal claim") with the Service, contending that it had overpaid the estate tax liability in the amount of $427,624 in taxes, and statutory interest thereon. The Estate argued that the valuation produced using the § 7520

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[3]This value increased by slightly over $4,000.00.

tables was unrealistic because the tables fail to consider "that the stream of future receivables is restricted from transfer and is not marketable."Based on the foregoing, the Estate claimed it was due a refund of $427,624 in tax and statutory interest thereon.[4]

The Service denied the Estate's informal claim on April 24, 2002. In denying the refund, the Service specifically stated that the Internal Revenue code "does not recognize any discounts or departures from the values prescribed by the Section 7520 tables based upon an alleged lack of marketability."In response, the Estate filed the matter now before the court.

II. SUMMARY OF THE ARGUMENTS

The Estate argues that the value of Mr. Bankston's interest in the structured payments are "restricted beneficial interests" within the meaning of 26 C.F.R. § 20.7520-3(b)(1)(ii), requiring valuation pursuant to 26 C.F.R. § 20.2031-1. Specifically, under the legislative grant of § 20.7520-3, annuities, subject to marketability restrictions, are excepted from valuation under the § 7520 tables.

Conversely, the government contends that Mr. Bankston's interest in the structured payments constitutes an "ordinary annuity interest" within the boundaries of the Code of Federal Regulations. Thus,

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[4]See U.S's Memo in Supp. For Partial Mot. For Sum. Jud., Exhibit 11.

the Service argues that it correctly employed the § 7520 actuarial tables to determine the value of Mr. Bankston's interest in the structured payments for his taxable estate as of July 30, 1996.

III. ANALYSIS

INCLUSION IN THE DECEDENT'S GROSS ESTATE

The IRS imposes a tax on the taxable estate of every decedent who is either a resident or a citizen of the United States. 26 U.S.C.2001(a). This includes, "all property, real or personal, tangible or intangible."[5]Section 26 C.F.R. § 20.2039-1(b)(1)(i) provides for the inclusion in a decedents gross estate:

> An annuity or other payment receivable by any beneficiary under any form of contract or agreement entered into after March 3, 1931, under which
> (i) An annuity or other payment was payable to the decedent, either alone or in conjunction with another person or persons, for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death....

Upon his death, Mr. Bankston was the named

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[5]26 U.S.C. 2031(a).

payee or annuitant of the structured payments. However, he was not the owner-Transamerica, MetLife, and First Colony obtained the policies and retained ownership. At his death, Mr. Bankston's right to receive payments under the Agreement passed to his beneficiary, the Estate of James Louis Bankston, Sr. Thus, neither party disputes that Mr. Bankston's interest in the annuities are to be included in the estate.

The value of the interest mandated for inclusion in his gross estate is limited to the extent of his interest at the time of his death.[6] 26 C.F.R. § 20.2031-1(b) stipulates "the value of every item of property includible in a decedent's gross estate under sections 2031 through 2044 is its fair market value at the time of decedent's death."[7]Pursuant to 26 C.F.R. § 20.7520-1(a), in the case of estates with valuation dates after April 30, 1989, the fair market value of annuities, interests for life or for a term of years (including unitrust interests), remainders, and reversions, is their present value determined using Section 20.7520-1(a).[8] To determine present value of

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[6]26 U.S.C. § 2033.

[7]Id. (emphasis supplied), 26 C.F.R. § 20.2031.

[8]See 26 C.F.R. § 20.7520-1(a).See also 5 Boris Bittker & Lawrence Lokken, 5 Federal Taxation Income Estate & Gifts 135.4.10 at 135-82 (stating that the willing-seller, willing-buyer standard has never been applied directly to private annuities, life estates, terms of years, remainders, reversions, and similar split interests in property, probably because such interests are rarely sold at arm's length. Instead, these interests

such items, Section 20.7520-1(a) provides annuity tables using an interest rate component located in 26 C.F.R. § 20.7520-1(b)(1)(i) and a mortality rate component described in 26 C.F.R. § 20.7520-1(b)(2).

VALUATION UNDER THE TAX CODE

There are, however, exceptions for computation of the value of annuities, unitrust interests, life estates, terms of years, remainders, and reversions after 1989. Specifically, the Secretary of the Treasury adopted: (1) final regulations in 26 C.F.R. § 20.7520-3(a) effective as to the estates of individuals who died after April 30, 1989, regarding specific provisions of the Code of Federal Regulations to which the tables set forth in 26 C.F.R. § 20.7520-1(a) did not apply; and (2) additional final regulations in 26 C.F.R. § 20.7520-3(b) effective as to estates of individuals who died after December 13, 1995, specifying the limited factual circumstances in which the application of the 26 C.F.R. § 20.7520-1 standards in valuing annuities for estate tax purposes is not mandatory.[9]

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are valued by determining the fair market value of the underlying property and dividing this value among the several interests in the property. When making such a division, one should use the Section 7520-1(a) actuarial tables based on assumed interest rates, mortality rates, and other factors unless the annuity, term of interests, or other such agreements are tied to something further, such as an independent underlying asset or an interest rate).

[9]See 26 C.F.R. §§ 20.7520-3(b) and 20.7520-3(c).

For estate tax purposes, the valuation date is the date of the decedent's death, unless an alternate valuation date is elected in accordance with 26 C.F.R. § 20.2032-1(a).[10] Given that Mr. Bankston died on July 30, 1996, and no alternative valuation date was selected, both 26 C.F.R. §§ 20.7520-3(a) and 20.7520-3(b) apply in the instant case.

Under these regulations, for estate tax purposes, the structured payments must be valued using the § 7520 actuarial tables if found to constitute an annuity, life estate, term of years, remainder or reversion. However, should the Estate demonstrate that a specific exception applies under either 26 C.F.R. § 20.7520-3(a) or (b), or that the tables produce an unrealistic or unreasonable result, deviation is permissible. The court will now proceed to determine the nature of the property interest below, and whether any exceptions apply which would require using an alternative method of valuation.

THE NATURE OF THE DECEDENT'S ESTATE UNDER LOUISIANA LAW

The threshold question in this case is whether the structured payments constitute an ordinary annuity interest. It is well established that, in general, "State law creates legal interests and rights.

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[10]Here, no alternative date was selected.

The federal revenue act designates what interests or rights, so created, shall be taxed."[11] In this case, the nature of decedent's interest is to be determined under the law of Louisiana, Mr. Anthony's domicile at the time of his death.[12]

Here, the property at issue is Mr. Bankston's right to receive periodic payments under the Agreement pursuant to the annuity contracts purchased from Georgia Pacific Corporation. There are two Fifth Circuit decisions on point which help to establish the nature of the interest. First, the court held payments from a structured settlement are annuities under Louisiana law.[13] Second, the court held that the right to receive a series of fixed

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[11] See Shapiro v. Comm'r of I.R.S., 66 T.C.M. (CCH) 1067 (1993), 1993 WL 415532, aff'd on other grounds, 111 F.3d 1010 (2d. Cir.1997) (citing Morgan v. Comm'r, 309 U.S. 78, 80, 60 S.Ct. 424, 84 L.Ed. 585 (1940)).

[12] See Cohn v. Heymann, 544 So.2d 1242, 1248 (La.App. 3 Cir.1989) (citing Succession of King. 170 So.2d 129 (La.App. 4 Cir.1964), writ denied,247 La. 409, 171 So.2d 666 (1965)).

[13] See Matter of Orso, 283 F.3d 686, 693-94 (5th Cir.2002)(analyzing in detail the nature of a Louisiana property interest held by an injured person who owed payments under a structured settlement agreement such as the one Bankston obtained in this action. In doing so, the Court overruled two of its prior decisions in which it had found such payments to be either accounts receivable (as well as an annuity) and installment payments on an underlying debt).

payments with virtually no risk of default, even when subject to marketability restrictions, constitutes an annuity.[14]

In Estate of Cook v. Commissioner of the Internal Revenue Service,[15] an estate executrix appealed a decision from the United States Tax Court, which concluded that a deceased's non-transferable lottery prize payable in 19 annual installments was a private annuity that must be valued, for estate tax purposes, in accordance with 26 C.F.R. § 20.7520-1(a).[16] In the opinion, the court concurred with the Tax Court's decision in Grisbauskas, which defined an annuity loosely as "a right to receive fixed, periodic payments, either for life or a term of years."[17]Accordingly, in Cook, the Fifth Circuit defined a private annuity as "the right to a series of fixed payments independent of market forces."[18]Applying this definition to the facts of the case, the Fifth Circuit held that the lottery prize at issue, an unsecured right to a series of fixed payments with virtually no risk of default,

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[14]Estate of Cook v. Comm'r of the I.R.S., 349 F.3d 850 (5th Cir.2003).

[15]Id.

[16]Id.

[17]Estate of Grisbauskas v. Comm'r of I.R.S., 116 T.C. at 142, 152 (2001), 2001 WL 227025, reconsidered and reversed,342 F.3d 85.

[18]Cook, 349 F.3d at 855.

constituted a private annuity subject to valuation under the § 7520 and related tables.[19]

Similarly, Mr. Bankston was the beneficiary of a series of fixed payments from a settlement. The payments were made monthly and annually to Mr. Bankston, and continue to be made to his estate. Virtually no risk of default threatens to end the payments before their completion. Thus, the interest at issue constitutes an annuity under Louisiana law.

THE NATURE OF THE DECEDENT'S ESTATE UNDER THE CODE OF FEDERAL REGULATIONS

Mr. Bankston's interest constitutes an "ordinary annuity interest" under the Code of Federal Regulations. Although neither § 20.2039 nor § 20.7520 defines the term "annuity," the regulations under these sections provide the following definitions. Regulation 26 C.F.R. § 20.2039-1(b)(1)(ii) defines an annuity as the right to one or more payments extending over a period of time. Similarly, under the heading entitled, "ordinary beneficial interests" within 26 C.F.R. § 20.7520-3(b)(1), are three subsets: (1) ordinary annuity interests; (2) ordinary income interests; and (3) ordinary remainder or reversionary interests. All three subsets are defined within the regulation. These three ordinary interests serve as a baseline in identifying the sorts of interests that must be valued under Section 20.7520-1.

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[19] Id.

Upon review, the Court has determined the interest at issue here falls within the subset termed "ordinary annuity interests." The current definition under 26 C.F.R. § 20.7520-3(b)(1)(i)(a), effective December 14, 1995, states, "An ordinary annuity interest is the right to receive a fixed dollar amount at the end of each year during one or more measuring lives or for some other defined period."[20] As applied to the current facts, Mr. Bankston had a right to a series of fixed payments owed to him over a number of years as a beneficiary of the annuities properly owned by Transamerica, MetLife, and First Colony. As a beneficiary, Mr. Bankston was without the right to transfer his interest in the structured payments to any other person. Upon his death, the Estate of Mr. Bankston automatically operated under law to become the beneficiary of the annuities owned by the above companies. Since becoming the beneficiary, the Estate has received the structured payments monthly and annually. Further, the Estate will continue to receive the entirety of the structured payments, fulfilling the obligations to Mr. Bankston set forth in the Agreement. As such, the structured payments appear to constitute an "ordinary annuity interest" under the Federal Regulations.

VALUING THE INTEREST

Subsequent to December 13, 1995, the only codal exceptions to the use of the Section 7520-1 actuarial tables for valuing ordinary annuity interests, other than commercial annuities or life

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[20] See 26 C.F.R. § 20.7520-3(b)(1)(A).

insurance contracts, are enumerated within 26 C.F.R. § 20.7520-3.[21]

The value for estate tax purposes of every private annuity must be determined using the § 7520 actuarial tables, provided however, that no specific exception under 26 C.F.R. § 20.7520-3(a) or (b) is applicable. Here, the Estate alleges the latter is applicable, meriting deviation from the annuity tables in the instant scenario.

The Estate posits that under the regulations at issue, when a decedent dies after December 13, 1995, and is receiving payments that are restricted from being "accelerated, deferred increased, decreased, sold assigned or encumbered," then the payments constitute a "restricted beneficial interest" within the meaning of 26 C.F.R. § 20.7520-3(b)(1)(ii).

The relevant definition here states:

> A restricted beneficial interest is an annuity, income, remainder, or reversionary interest that is subject to any contingency, power, or other restriction, whether the restriction is provided for by the terms of the trust, will, or other governing instrument or is caused by other circumstances. In general, a standard section 7520

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[21]And here, the regulation is applicable because the valuation date is post December 13, 1995.

> annuity, income, or remainder factor may not be used to value a restricted beneficial interest.[22]

The thrust of the Estate's argument hinges on the phrase "other restriction" within the definition. Specifically, plaintiff contends that the phrase is extraordinarily broad, and encompasses any restriction or limitation that hinders a beneficiary's ability to maximize the economic potential of their interests in an annuity, ie. marketability and assignment restrictions. As explained below, in light of the supplementary material of the regulatory section, and the precedential treatment of the regulation, the court finds the Estate's argument unpersuasive.

EXCEPTIONS TO THE VALUATION OF ANNUITIES UNDER 26 C.F.R. § 20.7520-3(b)(1)(ii)

Prior to December 14, 1995, the effective date of 26 C.F.R. § 20.7520-3, federal regulations did not provide enumerated exceptions to valuing an annuity outside the § 7520 tables. Additionally, few cases addressed the issue.

Within those limited cases, two separate schools of thought spawned concerning when valuing an ordinary annuity outside the § 7520 tables was

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[22]26 C.F.R. § 20.7520-3(b)(ii).

permissible. The Fifth Circuit, in Cook v. Commissioner,[23] and the Tax Court in Grisbauskas,[24] mandated valuation under the tables, even when an annuity was burdened by a restriction on marketability. Two separate circuits, the Second Circuit in Grisbauskas v. Commissioner,[25] and the Ninth Circuit in Shackleford v. United States, permitted deviation based on an anti-assignability or marketability limitation, provided that valuation under the tables produced an unrealistic and unreasonable result.[26] All of the latter cases addressed the issue under pre-December 14, 1995, regulations; thus, courts were unable to directly address the applicability of the 26 C.F.R. § 20.7520-3 exceptions, particularly the "restricted beneficial interests" exception, to the annuity tables.

The Estate urges the court to disregard the latter cases contending the enactment of 26 C.F.R. § 20.7520-3(b)(ii) legislatively overruled all prior understanding and precedent concerning exceptions to valuing annuities, directing that all exceptions to the use of the tables be specified only by regulation. Applying this logic, the Estate argues that the court may proceed to decide this issue with a "clean slate,"

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[23] 349 F.3d 850 (5th Cir.2003).

[24] 116 T.C. 142, 2001 WL 227025 (2001), 2001 WL 227025, reconsidered and rev'd, 342 F.3d 85.

[25] 342 F.3d 85 (2d Cir.2003).

[26] 262 F.3d 1028 (9th Cir.2001).

and may render an opinion without consideration of precedent. Conversely, the thrust of the government's rebuttal hinges on the court adopting the belief that the regulation merely formalizes and engraves the exceptions, embraced by the majority of existing precedent, on the very slate which the plaintiff is attempting to "wipe clean."

In assessing the validity of the Treasury regulation, the standard of review depends on whether the regulation is legislative or interpretative. The Fifth Circuit has articulated the following standards that govern the consideration of Treasury regulations by courts:

> A legislative regulation is given controlling weight unless it is "arbitrary, capricious, or manifestly contrary to statute."An interpretative regulation, on the other hand, is accorded less deference, but is nevertheless valid if it is a reasonable interpretation of the statute and if it "harmonizes with the plain language of the statute, its origin, and its purpose."[27]

The weight the court accords a regulation depends on the source of authority under which it was promulgated. Regulations issued under a specific

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[27]Snap-Drape Inc. v. Comm'r, 98 F.3d 194, 197 (5th Cir.1996) (citations omitted).

grant of authority, prescribing a method of executing a statutory provision, are to be accorded more weight than those promulgated under a more general authority.[28] In the area of tax, courts are "required to treat regulations issued under a general grant of authority with broad deference, although to a somewhat lesser degree than when Congress has made a specific delegation of authority in a specific statute."[29]

In the instant case, alterations were made to the applicable regulations, specifically § 7520, in conjunction with the Treasury Department's authority granted by § 5031 of the Technical and Miscellaneous Revenue Act of 1988 ("TAMRA").[30] The act was created by Congress for the purpose of making "technical corrections relating to the Tax Reform Act of 1986 and for other purposes."[31] In

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[28] See Dresser Industries, Inc. v. Comm'r of I.R.S., 911 F.2d 1128, 1137 (5th Cir.1990).

[29] See E.I. du Pont de Nemours & Co. v. Comm'r of I.R.S., 41 F.3d 130, 135 (3d Cir.1994).

[30] See PL 100-647, 1988 HR 4333(a). Short title of the Act is the "Technical and Miscellaneous Act Revenue Act of 1988."For the modifications to the regulations in conjunction with the Technical and Miscellaneous Revenue Act of 1988 at issue here, See59 FR 30180-01, 1994-2 C.B. 899 (1994), 1994 WL 249304(FR).

[31] Id.

conjunction with this grant of authority, on June 10, 1994, the IRS published in the Federal Register (59 FR 30180, titled "Actuarial Tables Exceptions") proposed amendments to the income, estate, and gift tax regulations, prescribing circumstances when the published actuarial tables could not be used to value certain interests. Written comments responding to the notice of proposed rulemaking were received in conjunction with PL 100-647, 1998 HR 4333. After consideration of written comments received, those amendments were revised and adopted by Treasury Decision 8630 ("T.D.8630").

In T.D. 8630, the Treasury department instructs that the well-established case law and administrative rulings, effective when 26 C.F.R. § 20.7520-3 was enacted, were not to be disturbed until after its effective date, December 13, 1995.[32] Thereafter, the material explains the valuation exceptions envisioned within § 20.7520-3(b), particularly the scope of "restricted beneficial interests."[33] Specifically, T.D. 8630 instructs that the exceptions to the actuarial tables of § 20.7520-3(a) and (b) are only to be applied when,

> [T]he instrument of the transfer [creating the annuity] does not provide the beneficiary of the annuity ... with the degree of beneficial

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[32] See T.D. 8630

[33] 116 T.C. 142, 2001 WL 227025 (2001), 2001 WL 227025 reconsidered and rev'd, 342 F.3d 85.

> enjoyment that is consistent with the traditional character of that property interest under traditional law ... [t]his degree of beneficial enjoyment is provided only if it was the transferor's intent, as manifested by the provisions of the governing instrument and the surrounding circumstances, that the trust provide an income interest for the income beneficiary during the specified period of time that is consistent with the value of the trust corpus and with its preservation.[34]

The supplementary information elaborates on those "restricted instances" of beneficial enjoyment, breaking them down to instances where it would be improper to apply either that the mortality component or the interest rate component of § 7520-1. T.D. 8630 explains that the mortality rate component of the § 7520 tables is not applicable in situations where the annuitant is diagnosed with a terminal illness because, for the purposes of an annuity, the measuring life is projected to survive until the age of 110. Further, the Treasury Decision illustrates two instances when it would be improper to apply the interest rate component of § 20.7520-1(b)(2) to an annuity. These two enumerated instances include (1) possible exhaustion of the fund or (2) an annuity's failure to earn a proper rate of

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[34]T.D. 8630

return because it is funded with unproductive property.[35] Additionally, the summary of the decision clearly states that "[t]hese regulations are necessary in order to provide guidance consistent with court decisions concluding that the valuation tables are not to be used in certain situations."[36] Clearly, the Treasury Department was trying to be consistent only with those cases which recognize departure from the tables in limited scenarios, where the facts of a specific case are substantially at variance with factual assumptions underlying the tables.[37] Thus, after examining the Supplementary material to § 20.7520-3, T.D. 8630, including the 1994-2 CB 899

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[35]Id.

[36]T.D. 8630, 1996-1 C.B. 339 (emphasis supplied).

[37]See e.g.,Cook, 349 F.3d at 855 (citing Berzon v. Commissioner, 534 F.2d 528, 532 (2d Cir.1976) (departure appropriate when income from an investment could be predicted to be zero but actuarial tables assumed a yield of 3.5%)); O'Reilly, 973 F.2d at 1406 (very low dividends were historically paid, but tables assumed a substantially higher yield); Froh v. Comm'r, 100 T.C. 1, 5, 1993 WL 1869 (1993), 1993 WL 1869 (income stream was expected to be exhausted before expiration of the income term); Estate of Jennings v. Comm'r, 10 T.C. 323, 327, 1948 WL 147, (1948), 1948 WL 147 (decedent's husband, a beneficiary for life, was not expected to live longer than a year from decedent's death); Hanley v. United States, 105 Ct.Cl. 638, 63 F.Supp. 73, 81-82 (1945) (actual interest rate was 3%, but tables assumed rate of 4%).

(1994 WL 249304(FR)) documents published in the federal register, the Court holds that the regulation at issue merely codifies and embodies those exceptions contemplated by the Fifth Circuit in[38] Cook and the Tax court in Grisbauskas.[39] The Estate's argument, that the passage of 20.7520-3 renders past precedent irrelevant, is without merit.

CODAL EXAMPLES FOR DEVIATION FROM THE ANNUITY TABLES BASED ON "RESTRICTED BENEFICIAL INTERESTS"

Moreover, 26 C.F.R. § 20.7520-3 provides examples of special factors to which the application of § 20.7520-3(b)(1)(ii) is required. These examples focus on limitations that make it problematical for the annuity to be paid for the defined period, including (1) the power to invade a trust corpus that could diminish the income interest to be valued and (2) an annuity payment measured by the life of one with a terminal illness.[40] While it is possible this list

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[38]349 F.3d 850.

[39]116 T.C. 142, 2001 WL 227025 (2001).

[40]See §20.7520-3(b)(2)(v) Examples 1-5. Specifically, 26 C.F.R. § 20.7520-3(b)(2)(v) Example 5 (styled "Eroding corpus in an annuity trust" which sets forth the facts creating a situation where there exists the possible exhaustion of the corpus before the final payment is made on the annuity, application of a standard Section 7520-1 actuarial table is not permitted).

is merely illustrative, it seems the most obvious prohibition, the one that is at issue here, i.e. a restriction on marketability, is not contemplated within the definition of "restricted beneficial interest."

Thus, only when the interest and mortality rate components prescribed under 26 C.F.R. §§ 20.7520-1(b)(1) and 20.7520-1(b)(2) are not applicable in determining the value of an annuity will the tables not provide the annuitant "with the degree of beneficial enjoyment that is consistent with the traditional character of that property interest under applicable law."[41] Here, the facts of the instant case do not present any of the above exceptions to the court.

TECHNICAL ADVICE MEMORANDA

Furthermore, the government provided this court with a private "letter ruling" known as a Technical Advice Memorandum ("TAM").[42] This TAM was issued to an unidentified tax payer on December 29, 1995, sixteen days after the regulation became effective. It was also publicly issued on April 19,

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[41]See 26 C.F.R. § 20-7520-3(b).

[42]See Attachment 1 to Supp. Mem. of the U.S. in Support of Motion for Part. Sum. Jud., 9616004 (1996 WL 188042)(IRS TAM).

1996.[43] Pursuant to 26 C.F.R. § 301.6110(k)(3)[44] of the Internal Revenue Code, written determinations, under 6110(b)(1)(A), including "Technical Advice Memoranda," may not be used or cited as precedent. Such memoranda, however, are still recognized as relevant.[45] In Hanover Bank v. Commissioner, the Supreme Court stated, "[A]lthough the petitioners are not entitled to rely upon unpublished private rulings which were not issued specifically to them, such rulings do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws."[46]Accordingly, the court relied solely on private letter rulings as "further evidence" that its

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[43]See Attachment 1 to Supp. Mem. of the U.S. in Support of Motion for Part. Sum. Jud., 9616004 (1996 WL 188042)(IRS TAM).

[44]Formerly, 26 USC 6110(j)(3), amended by the 1998 Amendments Pub.L.105-206, Section 3509(b), redesignated former subsec. (j) as (k).

[45]Transco Exploration Co. v. Comm'r of I.R.S., 949 F.2d 837, 840 (5th Cir.1992) (citing Amato v. Western Union Int'l, 773 F.2d 1402, 1412-3 (2d. Cir.1985), cert. denied.474 U.S. 1113, 106 S.Ct. 1167, 89 L.Ed.2d 288 (1986).See also, Watts Copy Systems Inc. v. Comm'r, 67 T.C.M. (CCH) 2480 (1994), 1994 WL 100652 (acknowledging lack of precedential effect of TAM but finding factors identified therein "particularly significant" in construing transactions.")

[46]369 U.S. 672, 686, 82 S.Ct. 1080, 8 L.Ed.2d 187 (1962).

construction of the statutory term at issue was "compelled by the language of the statute."[47] This is the extent to which this Court intends to review the TAM.

In the TAM, the IRS advised the estate of a decedent lottery winner as to whether, for estate tax purposes, the present value of lottery winnings payable in the form of an annuity were to be valued using the annuity tables.[48]Primarily, the estate contended that because the annuity required judicial approval before it could be assigned, the annuity constituted a "restricted beneficial interest" within the meaning of 26 C.F.R. § 20.7520-3(b)(1)(ii). The Service ultimately rejected the estate's interpretation of the phrase, explaining that "restricted beneficial interest" encompasses those "other limitations similar to contingencies (e.g., events that if occurring can result in termination of the payment of the annuity) or powers (e.g., powers to divert the annuity payments or the funds from which the annuity is to be made), such that receipt of the annuity payments by the beneficiary becomes questionable."[49]Further, the Service explained that 26 C.F.R. § 20.7520-3(b)(2) makes it clear that the phrase "other restriction" references only limitations that impact the ability to pay the annuity interest for the entirety of the

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[47]Id. at 687.

[48]See 9616004 (1996 WL 188042)(IRS TAM).

[49] Id.

defined period. As examples of these limitations, the Service listed the following (1) terminal illness of the annuitant and (2) possible exhaustion of the corpus prior to fulfillment of the entirety of the payments to the beneficiary. The analysis concluded with this statement:

> [W]e [the Service] believe it is clear that under § 20.7520-3(b)(1) and (2), the standard annuity tables and factors are to be used to determine the present value of an annuity unless the right to receive the annuity is restricted or limited by the governing instrument or other circumstances or the ability of the underlying fund to pay the annuity is restricted or limited by the governing instrument or other circumstances. The estate's interpretation of the term "restriction" as including a restriction on the right to assign the annuity, totally disregards the balance of the regulation and takes the term entirely out of context.[50]

Moreover, in a similar Technical Advice Memoranda issued publicly by the Service on March 5, 1999, the Service applied the identical analysis to another lottery prize with similar restrictions.[51] Here,

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[50] Id. (emphasis supplied).

[51] TAM 1999-09-001, 1999 WL 113072 (IRS TAM).

the Service contemplated whether lottery winnings which were only assignable by judicial order or if the prize winner died before the prize was paid, constituted a "restricted beneficial interest" within the meaning of 26 C.F.R. § 20.7520-3.

The TAM ultimately stated that the assignability restrictions of the annuity were not the types of "restrictions" contemplated within 26 C.F.R. § 20.7520-3. Specifically, the memoranda stated "[n]one of the exceptions to using the standard actuarial factors applies in this case. The lottery winnings will not be paid from a fund that is expected to exhaust prior to the last annuity payment, and the payment of the annuity is not based on a measuring life of an individual who is terminally ill."[52] Because none of the latter restrictions were present, the Service held that the lottery winnings plainly constituted an annuity to be valued using the actuarial tables.[53]

Such reasoning is consistent with all except for the Second and Ninth Circuit decisions the Estate is asking this Court to follow. Namely, that the lack of marketability of a private annuity is not a basis for departure from valuation unless the effect of the trust or the will or other governing instrument is to ensure that the annuity will be paid for the entire defined period. Particularly, the court interprets

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[52] Id. (emphasis supplied).

[53] Id.

these situations to include where (1) the mortality rate is not warranted because a beneficiary is terminally ill at the time of the transaction, or (2) the income interest rate consistent with the tables is not applicable because the fund is in danger of exhausting before the entirety of the interest is paid in full. Absent either scenario, deviation based solely on a prohibition concerning marketability is not warranted.

III. APPLICATION OF § 20.7520-3 IN PRECEDENT

The District of Massachusetts rendered a recent decision concerning valuation under 26 C.F.R. § 20.7520-3. In Estate of Donovan v. USA,[54] an estate brought a similar action for an estate tax refund on future payments of lottery winnings. The threshold question considered by the court was whether the lottery winnings constituted an "ordinary annuity interest" to be valued under the § 7520 tables, or a "restricted beneficial interest" excepted from valuation under the tables.

Donovan concerns the valuation of a decedent's interest in winnings from the Massachusetts' lottery in 1999. Under Massachusetts' law, the lottery winnings were not

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[54]95 A.F.T.R.2d 05-2131 (D.Mass 2005), 2005 WL 958403.

permitted to be assigned or accelerated.[55] After decedent passed, his Estate valued his annuity for estate tax purposes pursuant to the § 7520 tables. Subsequently, the Estate sought a tax refund, alleging that the assignment restrictions under Massachusetts law, rendered the lottery annuity a "restricted beneficial interest," or in the alternative, its valuation under the tables was unrealistic or unreasonable. The Estate argued, based on the restrictions, that the valuation must include consideration of the non-marketability restriction of the property interest. Accordingly, the Estate demanded a "fair market valuation" pursuant to 26 C.F.R. § 20.2031-(b), rather than the interest rate component and mortality rate component of § 20.7520-1. After a detailed analysis, the court concurred with the Tax Court's decision in Grisbauskas,[56] stating,

> In light of the examples given ... the intent of this provision was to formalize the existing case law regarding the validity of the tabular assumptions in situations where facts show a clear risk that the payee will not receive the anticipated return. Thus, a restriction within the meaning of the regulation is one

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[55] Id.

[56] Noting the inability to consider § 20.7520-3 in the Tax Court's ruling.

> which jeopardizes receipt of the payment stream, not one which merely impacts the ability of the payee to dispose of his or her right thereto.[57]

In accordance with this reasoning, the court held that the phrase "restricted beneficial interests" encompasses only those restrictions which jeopardize a decedent's assurance in receiving or enjoying the entirety of their interest in an annuity. Therefore, only when the right to receive the entirety of the payments is compromised may the situation warrant diverging from the annuity tables under the guise of being a "restricted beneficial interest."

While the inability to market or transfer the Estate's interest in the structured payments is undoubtedly a restriction to the Bankston heirs, it is not the type of "other restriction" contemplated by 26 C.F.R. § 20.7520-3(b). Such an interpretation of the phrase "restricted beneficial interest" thwarts the historical and legislative basis behind the creation of the exceptions in 26 C.F.R. § 20.7520-3(b). Consequently, this Court will hold that the "contingency, power and other restriction" language used in the regulation refers only to those limitations that would divest Mr. Bankston's estate of all of the periodic payments due under the Agreement, as of July 30, 1996, and not to limitations on the ability of

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[57] Id. (citing Grisbauskas, 116 T.C. at 164-65) (citations omitted).

Bankston and his heirs to market their right to periodic payments. Thus, Mr. Bankston's interest constitutes an ordinary annuity interest to be valued under the § 7520 tables.

IV. THE APPLICATION OF A PERCENTAGE DISCOUNT

In the alternative, should the Court hold that the valuation is proper, the Estate requests a further discount than is required under the § 7520 tables, based on the alleged "limited market" available to Mr. Bankston's interests. Specifically, petitioner argues that the Court, in applying the § 7520 tables, applies by default the standard marketability discount underlying the tables. The Estate asserts that in addition to the market discount provided by the tables, the court should also apply the additional 32% discount utilized by the Fifth Circuit in Cook.[58] Petitioner alleges the additional discount is necessary because here, as in Cook, there is a limited market for the structured settlement payments, meriting a larger discount than is provided by the tables.[59]

The determination of the proper valuation method in a federal estate tax case is a matter of law; however, the mathematical computation of a fair

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[58] 349 F.3d 850.

[59] *Id.*

market value is a factual issue.[60] Since this is a Motion for Summary Judgment, the Court will only concern itself with the procedural issue at hand-determining the proper method of valuation of the interests at issue.

As previously established, this right clearly constitutes an "ordinary annuity interest" subject to valuation as prescribed in 26 C.F.R. § 20.7520-3(b)(1)(i)(A) and the implementing regulations under 26 C.F.R. §§ 20.7520-1(a)(1) and 20.2031-7(a). Thus, valuation under the § 7520-1 tables was proper.

However, in so holding, the Court also inadvertently upholds the government's calculation of Mr. Bankston's interest in the structured payments. Though this is a factual conclusion, it is one that the Court cannot avoid. As the government correctly points out, the Estate did not directly contest the calculation by the Service in the event that the court determined the annuity tables were the appropriate source for valuation.[61] Instead, the Estate merely asked the Court to apply a larger discount, which is factually inapplicable to this case. Thus, the court will uphold the government's value of the Estate's interest in the structured payments, calculated by application of the § 7520 actuarial tables.

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[60] Dunn, 301 F.3d 339, 348 (5th Cir.2002).

[61] See Petitioner's memorandum in support, pg. 4 n. 1 (rec.doc. no. 28).

V. UNREALISTIC OR UNREASONABLE RESULT

The determination that the property interest here is an "ordinary annuity interest" presupposes the application of the § 7520 tables. Thus, the tables are to be used unless, "it is shown that the result is so unrealistic and unreasonable that either some modification in the prescribed method should be made, or complete departure from the method should be taken, and a more reasonable and realistic means of determining value is available."[62] In this connection, "[t]he party challenging applicability of the tables has the substantial burden of demonstrating that the tables produce an unreasonable result."[63]

The Code of Federal Regulations defines the phrase "fair market value" as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts."[64] Here, the Estate

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[62] See Weller v. Comm'r, 38 T.C. 790, 803, 1962 WL 1155 (1962) (citations omitted); See also Cook, 349 F.3d at 854; Shackleford, 262 F.3d at 1031; O'Reilly, 973 F 2d 1403, 1407 (8th Cir. 1992).

[63] Cook, 349 F.3d at 854-55 (citing O'Reilly, 973 F.2d at 1409).

[64] 26 C.F.R. § 20.2031-1(b).

argues there is an alleged, albeit "limited market," for Mr. Bankston's interest in the structured payments. Under this alleged market, the value of the annuities, as of July 30, 1998, decreases from $2,375,710, the value calculated using the § 7520 actuarial tables, to $1,198,900. Consequently, the calculation produced using the § 7520 tables is unrealistic and unreasonable.

Few circuits have squarely addressed this issue, and those which had addressed it only in the context of lottery winnings. Although what is at issue here are payments from a structured settlement and not lottery winnings, both types of cases concern annuities, making the analysis applicable to the Estate's interests.

The Fifth Circuit held that departure from the § 7520 actuarial tables based on a value differential created by a marketability restriction on an annuity is not appropriate.[65] Moreover, the Fifth Circuit opposes such deviation from the mortality and annuity rates assigned by the tables, except in those limited situations where the underlying assumptions of the 'actuarial tables do not fit the facts of the specific valuation at issue. In particular, those cases where the mortality rate and/or interest rate assumptions are not applicable because of specific factual abnormalities.[66]

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[65]See Cook, 349 F.3d 850.

[66]Id. at 855 (citing Berzon v. Comm'r, 534 F.2d 528, 532 (2d Cir.1976) (departure appropriate when income from an investment could be predicted to be zero

In Cook[67] the estate hired experts who estimated the fair market value of the partnership interest in a decedent's lottery prize to be $671,465 less than the value reflected by the § 7520 actuarial tables. Despite the differential, the Fifth Circuit held that the § 20.7520-1 valuation was realistic because the non-marketability of a private annuity was an assumption underlying the annuity tables. Only assumptions not contemplated by the mechanical application of the tables-the annuity not earning a proper rate of return, danger of the fund exhausting or being otherwise diverted, or the individual measuring life having an unexpected shortened period due to a terminal illness-require a method other than that dictated under the actuarial tables.

This viewpoint has created a split in the Circuits, with the Second and Ninth Circuits holding that non-marketability should be factored into the

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but actuarial tables assumed a yield of 3.5%)); O'Reilly v. Comm'r, 973 F.2d 1403, 1406 (very low dividends were historically paid, but tables assumed a substantially higher yield); Froh v. Comm'r, 100 T.C. 1, 5, 1993 WL 1869 (1993) (income stream was expected to be exhausted before expiration of the income term); Estate of Jennings v. Commissioner, 10 T.C. 323, 327, 1948 WL 147 (1948) (decedent's husband, a beneficiary for life, was not expected to live longer than a year from decedent's death); Hanley v. United States, 105 Ct.Cl. 638, 63 F.Supp. 73, 81-82 (1945) (actual interest rate was 3%, but tables assumed a rate of 4%).

[67] 349 F.3d 850.

valuation of such interests.[68] In Grisbaukas[69] the Second Circuit departed from valuation of the § 7520 tables based on the large value differential created by an annuity's prohibition on marketability. The court was largely guided by the Ninth Circuit decision in Shackleford.[70] In Shackleford the Ninth Circuit permitted departure from the § 7520 tables when determining the fair market value of a California lottery prize because it was subject to anti-assignment restrictions. In so holding, the Ninth Circuit stated that the application of the § 7520 tables was inappropriate where a taxpayer provided a more realistic and reasonable valuation method to

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[68]Grisbauskas, 342 F.3d 85 (2d Cir.2003); Shackleford, 262 F.3d 1028. The Court would be remiss not to clarify that all these cases addressed the question under the pre-December 14, 1995 regulations, and consequently did not address the applicability of the § 20.7520-3(b) exceptions to the annuity tables. The provisions of that section, however, only emphasize and reiterate the position taken by the Tax Court in Grisbauskas, and the Fifth Circuit, clearly elucidated that an interest should only be excepted when the assumptions underlying the annuity tables are inapplicable, i.e. when the interest rate or the mortality rate are not applicable, as in the event that the decedent was not to receive the entirety of the payments or the decedent was inflicted with a terminal illness that would warrant diversion from the mortality rate.

[69]342 F.3d 85.

[70]262 F.3d 1028.

determine the value of the annuity.[71] Both cases were premised on the general principle of property, namely that the "right to transfer is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' "[72] And further, that "an asset subject to marketability restrictions is, as a rule, worth less than an identical item that is not so burdened."[73]

The Fifth Circuit decision of Cook, rendered subsequent to both Grisbauskas and Shackleford clearly establishes the court's stance that an unsecured right to a series of fixed payments, with virtually no risk of default, is subject to valuation under § 7520 and related tables.[74] Further, the Fifth Circuit blatantly opposes the Second and Ninth Circuits' assertions that the reasonable valuation for annuity requires a discount which is already contemplated by the tables and based upon the premise that the right to alienate is fundamental to the valuation of any property.[75]

The Fifth Circuit's decision to adhere to the Section 7520 tables, was largely fueled by Congress'

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[71] Id.

[72] Id. at 1032 (citation omitted).

[73] Grisbauskas, 342 F.3d at 88 (citing Shackleford, 262 F.3d at 1032).

[74] 349 F.3d at 850

[75] Id. at 856-57.

desire for uniformity in valuing annuities. The court reasoned it was paramount for Congress to have convenience and certainty in valuation of annuities over accuracy, while providing uniform assumptions for consideration of minor restrictions therein.[76] More plainly stated, Congress acknowledges that the tables would not produce the same valuation as would an actual free market, but when applied in the aggregate, error costs will be small.[77] Further, that the tables' value is to be upheld unless found to be vastly unrealistic and unreasonable due to an assumption not contemplated by the tables. Such an intention directly contradicts the Second Circuit's stance that Congress' desire for uniformity in valuation of annuities is "not so demanding."[78]

Based on the foregoing, the Court is not persuaded by plaintiff's argument that a hypothetical "economic reality" is sufficient to empower an administratrix of an estate to shop for a hypothetical market for their interests in order to pay less estate taxes. Instead, the factual scenario at hand is entirely harmonious with the premises and assumptions that underlie the actuarial tables. As such, the Court will hold that the valuation

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[76] Id. at 854.

[77] Id. at 854 (citing Bank of Cal. v. United States, 672 F.2d 758, 760 (9th Cir.1982); Continental Ill. Natl. Bank & Trust Co. v. U.S., 504 F.2d 586 (7th Cir.1974).

[78] Grisbauskas, 342 F.3d at 87.

calculated by the actuarial tables, though it is substantially less in comparison to the plaintiff's alleged "free market" valuation, does not create an unrealistic or unreasonable value.

VI. EVIDENTIARY ISSUES

Defendants allege that several of the Estate's statements of uncontested fact refer to documents and their specific contents, but no copies of the documents have been submitted by the Estate for the Court's consideration as mandated by Rule 56(E). For the purposes of this motion, these documents are unnecessary to aid the court in reaching a decision. The Court's decision, regardless of these documents, would be rendered in conformity with the reasoning set out above.

VII. CONCLUSION

The United States' partial motion for summary judgment (doc. 22) is hereby GRANTED and the petitioner's cross motion for partial summary judgment (doc. 26) is hereby DENIED.

Baton Rouge, Louisiana, June 17th, 2005.

/s

JAMES BRADY, DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX C

26 U.S.C. § 7520(a)

(a) General Rule

For purposes of this title, the value of any annuity, any interest for life or a term of years, or any remainder or reversionary interest shall be determined--

(1) under tables prescribed by the Secretary, and

(2) by using an interest rate (rounded to the nearest 2/10ths of 1 percent) equal to 120 percent of the Federal midterm rate in effect under section 1274(d)(1) for the month in which the valuation date falls.

If an income, estate, or gift tax charitable contribution is allowable for any part of the property transferred, the taxpayer may elect to use such Federal midterm rate for either of the 2 months preceding the month in which the valuation date falls for purposes of paragraph (2). In the case of transfers of more than 1 interest in the same property with respect to which the taxpayer may use the same rate under paragraph (2), the taxpayer shall use the same rate with respect to each such interest.

26 C.F.R. § 20.2031-1(b)

(b) Valuation Of Property In General.

The value of every item of property includible in a decedent's gross estate under sections 2031 through 2044 is its fair market value at the time of the decedent's death, except that if the executor elects the alternate valuation method under section 2032,

it is the fair market value thereof at the date, and with the adjustments, prescribed in that section. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. The fair market value of a particular item of property includible in the decedent's gross estate is not to be determined by a forced sale price. Nor is the fair market value of an item of property to be determined by the sale price of the item in a market other than that in which such item is most commonly sold to the public, taking into account the location of the item wherever appropriate. Thus, in the case of an item of property includible in the decedent's gross estate, which is generally obtained by the public in the retail market, the fair market value of such an item of property is the price at which the item or a comparable item would be sold at retail. For example, the fair market value of an automobile (an article generally obtained by the public in the retail market) includible in the decedent's gross estate is the price for which an automobile of the same or approximately the same description, make, model, age, condition, etc., could be purchased by a member of the general public and not the price for which the particular automobile of the decedent would be purchased by a dealer in used automobiles. Examples of items of property which are generally sold to the public at retail may be found in §§ 20.2031-6 and 20.2031-8. The value is generally to be determined by ascertaining as a basis the fair market value as of the applicable valuation date of each unit of property. For example, in the case of

shares of stock or bonds, such unit of property is generally a share of stock or a bond. Livestock, farm machinery, harvested and growing crops must generally be itemized and the value of each item separately returned. Property shall not be returned at the value at which it is assessed for local tax purposes unless that value represents the fair market value as of the applicable valuation date. All relevant facts and elements of value as of the applicable valuation date shall be considered in every case. The value of items of property which were held by the decedent for sale in the course of a business generally should be reflected in the value of the business. For valuation of interests in businesses, see § 20.2031-3. See § 20.2031-2 and §§ 20.2031-4 through 20.2031-8 for further information concerning the valuation of other particular kinds of property. For certain circumstances under which the sale of an item of property at a price below its fair market value may result in a deduction for the estate, see paragraph (d)(2) of § 20.2053-3. 20.2031-1

26 C.F.R. § 20.7520-3(b)(1)(ii)

(ii) Certain Restricted Beneficial Interests.
A restricted beneficial interest is an annuity, income, remainder, or reversionary interest that is subject to any contingency, power, or other restriction, whether the restriction is provided for by the terms of the trust, will, or other governing instrument or is caused by other circumstances. In general, a standard section 7520 annuity, income, or remainder factor may not be used to value a restricted beneficial interest. However, a special section 7520 annuity,

income, or remainder factor may be used to value a restricted beneficial interest under some circumstances. See paragraphs (b)(2)(v) Example 4 and (b)(4) Example 1 of this section, which illustrate situations where special section 7520 actuarial factors are needed to take into account limitations on beneficial interests. See Section 20.7520-1 (c) for requesting a special factor from the Internal Revenue Service.

(iii) Other beneficial interests.

If, under the provisions of this paragraph (b), the interest rate and mortality components prescribed under section 7520 are not applicable in determining the value of any annuity, income, remainder, or reversionary interest, the actual fair market value of the interest (determined without regard to section 7520) is based on all of the facts and circumstances if and to the extent permitted by the Internal Revenue Code provision applicable to the property interest.